United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

ORIGINAL

CA 75-7519

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P/S

United States Court of Appeals

For the Second Circuit

THE FIRST NATIONAL BANK OF CINCINNATI,
Plaintiff,

against

SIDNEY PEPPER,
Appellant-Cross-Appellee,

ROSALIE M. ARLINGHAUS, Individually; ROSALIE M. ARLINGHAUS, as Custodian for Frank H. Arlinghaus, Jr.; ROSALIE M. ARLINGHAUS, as Custodian for John C. Arlinghaus; ANNA MARIE SCHLERETH; HARRY W. BOGAARDS, JR.; ELSIE W. COX; RICHARD M. HOUGH; RALPH J. DEL CORO; BERTHA A. BROGLIE; ALIX ANN ARLINGHAUS,
Appellees,

ROSALIE M. ARLINGHAUS, as Executrix of the Will of Frank H. Arlinghaus,
Appellee-Cross-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLANT AND CROSS-APPELLEE

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UNITED STATES COURT OF APPEALS
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-against- :

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Appellant-Cross Appellee, : Docket No. CA #75-7519

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Appellees. :

ROSALIE M. ARLINGHAUS, as Executrix of the Will of Frank H. Arlinghaus, :

Appellee-Cross Appellant. :

- -x

BRIEF ON BEHALF OF APPELLANT, SIDNEY PEPPER

Preliminary Statement

The decision of the District Court in this case was rendered by Judge Marvin E. Frankel. His opinion has not been reported.

Issue Presented for Review

Whether the District Court erred in holding that the

settlement agreement among the appellees and appellant, Sidney Pepper (hereafter Pepper), of his claim for legal fees assertedly owing to him by Modern Talking Picture Service, Inc., Rosalie Arlinghaus and Howard Eberle, in reliance upon which Pepper released his attorney's lien upon property of theirs which he held, was voidable at the election of the appellees as the product of duress exercised upon them by Pepper.

Statement of the Case

A. The Nature of the Case and Prior Proceedings

This is a statutory interpleader action which was commenced by the First National Bank of Cincinnati by depositing into Court a fund of $75,000 to which Pepper and the appellees asserted conflicting claims. The controversy between Pepper and the appellees had its origin in a settlement agreement signed by the parties on June 7, 1968, pursuant to which Pepper released his attorney's lien on the corporate books and records of Modern Talking Picture Service, Inc. (Modern) and on the stock certificates of two shareholders, one Howard Eberle (Eberle) (not a party to the action) and appellee Rosalie Arlinghaus (Arlinghaus). By the terms of the agreement, the appellees compromised Pepper's claim for legal fees and disbursements of $116,000 by promising to pay him $75,000 out of the proceeds of their sales of Modern stock to one Unger, and secured their undertakings by delivering to Pepper irrevocable assignments of their rights to $75,000 of such proceeds addressed to the First National Bank of Cincinnati

with which Unger had lodged the funds to pay for the stock. Incident to the settlement agreement, the parties exchanged mutual releases. Within a matter of days following the execution of the settlement agreement, the appellees repudiated the agreement which they had concluded with Pepper and directed the Bank not to make any payment to Pepper. The Bank thereupon commenced this interpleader action.

In the District Court, summary judgment was originally granted to Pepper. This Court reversed (454 F.2d 626) and remanded the case for trial. The trial was held before Judge Frankel who held that the settlement agreement of June 7, 1968 was the product of duress and voidable by the appellees.

B. The Facts

Modern was a closely-held corporation which, as of June 7, 1968 had outstanding 94,500 shares of capital stock. Arlinghaus, in her individual capacity was the owner of 3,500 of such shares and in her fiduciary capacities as the executrix of the estate of her husband, Frank H. Arlinghaus, and as custodian for three children held an additional 49,170 shares so that she controlled, in aggregate, 52,670 of the 94,500 shares which were outstanding. The next largest shareholder was Eberle, who individually and as co-trustee with his son, controlled 13,400 shares. Thus, Arlinghaus and Eberle controlled more than 70% of the number of shares which Modern had outstanding

(Trial Stipulation). Only one of Modern's officers, William McCallum, held a significant number of shares and he was due to retire.

Pepper is an attorney whose deceased partner had been instrumental in arranging for Frank Arlinghaus to become the head of the business which then was being conducted by American Telephone & Telegraph Co. (A T & T). In 1936, A T & T determined to divorce itself of the business and turned it over to Mr. Arlinghaus and its other employees to operate as an independent company, all for $5,000 which was loaned by A T & T to Mr. Arlinghaus and his fellow employees and used by them to acquire the Modern stock (86a-89a).

At or about that time, Messrs. DeWitt and Pepper became counsel to Modern and continued as such until Mr. DeWitt's death in 1965, whereupon Pepper continued as Modern's counsel until discharged in May, 1968 (90a, 660a).

After Mr. Arlinghaus' death in 1964, Modern was financially unable to purchase the stock of the estate and, following the audit of the return which was concluded late in 1966, Arlinghaus was confronted with the problem of paying the Federal estate tax deficiency of $73,000 (Ex. L) and of realizing on the value of the Modern stock which comprised, by far, the single most valuable asset of her husband's estate (Exs. L, L-1.)

In the fall of 1967, Arlinghaus authorized Pepper to look

for an acceptable "deal" (84a-85a). Even prior thereto, the company's management had indicated its desire to effect a sale or merger of Modern to an acceptable purchaser and Pepper, at least as early as September, 1967, was authorized by Mr. Lenz (Lenz), Modern's president, to deal with Bell & Howell Company (507a, 501a).*

Additionally, the letter of Charles McCandless, dated November 18, 1967 and the Wometco Enterprises, Inc. correspondence of October, 1967 (contained in Ex. 23A) evidence that prior to December, 1967, the company's management had called upon Mr. Pepper's services in negotiations with prospective purchasers. This documentary evidence establishes two things:

(1) That while Pepper may have been confused as to the date of the start of his work, it obviously started before December 20, 1967 which Judge Frankel used as the basis of his dramatic footnote calculations, and (2) that Pepper had been requested to perform services for Modern at the direction of Modern's president, Lenz, a point which is of significance to the determination of this appeal.

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* The Court below made much of what the Court characterized as "dramatically contradictory testimony" given by Pepper with respect to the amount of time he spent in dealing with offers of prospective purchasers (459a). However, Pepper's September 27, 1967 Memorandum (507a), and Bell & Howell Company's letter of October 4, 1967, signed by its president (501a) which confirms Pepper's memorandum establish that such services were being rendered earlier than Judge Frankel's starting date. Other documents contained in Ex. 23A evidence much earlier activity, and since he was not discharged as Modern's attorney until May 24, 1968, infra, p. 15, there is no basis for the assumption that March, 1968 marked the end of his services.

The work which Pepper performed consisted of screening Modern suitors, about thirty in number, including Bell & Howell Company, Metro Goldwyn Mayer, Columbia Pictures, Warner Bros. Pictures, General Electric, Wometco Enterprises, Inc., as well as dealing with corporate finders, promoters and brokers (502a-552a, Ex. 23-A, 610a-613a). The word "screening" does not adequately describe the nature and extent of the work which Pepper was called upon to perform. An outline of the extent of his efforts is set forth in Ex. FFFF (610a-613a). In addition, Pepper prepared the asset acquisition agreement with Sonderling Broadcasting Corp. (553a-609a) which aborted as a result of a temporary restraining order granted by the Delaware Chancery Court on the very eve of the transaction. In response to the Court's inquiry, Pepper fleshed out the bare bones of "screening". He testified (128a-129a) in response to the Court's question:

> "THE COURT: So we can get through with this agreement, let me ask you to describe the nature of the legal services you performed in connection with those companies?
>
> THE WITNESS: I studied the various companies. Most of them were offering stock and it was a device to give us paper for our going business. I didn't think it was desirable to take their papers.
>
> THE COURT: Just tell me what you did.

THE WITNESS: I studied the financial reports of these companies, their documentation with reference to the stock so I would understand it.

I got further particulars as to how they really intended to implement their offers.

Then I checked from various sources the strength of the companies and what they could do for our company and its stockholders; whether they would be the kind of companies that would be good for Mrs. Arlinghaus and the others to invest in.

I had taken it up with the key employees of Modern to see if the proposed acquiring corporations would be acceptable to them for continued employment.

There were some that they didn't wish to be associated with. That eliminated them because unless we could deliver to the purchaser a going organization, we would have no hope of consummating any deal, in my opinion.

There were tax problems like, for example, the last one, Sonderling wanted a pooling of earnings method and so did Fugua."*

Furthur corroboration appears in Pepper's letter to Lenz dated February 21, 1968 regarding his Warner-Seven Arts evaluation (546a, 544a-545a).

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* Pepper's testimony of his checking the prospects is corroborated by Weil's testimony (228a).

> "Q. Do you remember anything more about your conversation with Mr. Pepper on this occasion?
>
> A. Yes. I had a number of clients that I wanted to show it to, but one, in particular, and he would not allow me to show it to the client until I first got him the annual report on the client, until he was certain that he thought he had the cash or could come up with some money, and he wanted to approve the client before I even showed it to him.
>
> He gave me a hard time on it; I remember that. No offense meant, gentlemen."

For Eberle, Pepper had prepared a Trust Agreement (466a-488a), a designation of additional trustees thereunder (492a-497a), and a fiduciary income tax return for the Trust (489a-490a).

In or about March, 1968, Sonderling Broadcasting Corp. offered to purchase all of the outstanding shares of Modern stock, or in the alternative, all of Modern's assets for $2,800,000.* Sonderling's offer was set forth in its letter of March 20, 1968, addressed to Modern's Board of Directors (Ex. 11)(622a-625a, 626a-628a). The letter was hand-delivered to Mr. Lenz, a director and president of Modern or to William Oard, a director and vice president of Modern by Steven Weil, a business broker who had obtained Sonderling's offer. Weil so testified (230a-231a).

Weil's testimony was taken after the Sonderling transaction aborted because of the temporary injunction granted by the Delaware Chancery Court, (following which Weil defected to the Sherman Unger camp in the hope of salvaging a commission from him, infra, pp. 16, 17) and his testimony squares with that of Sonderling (Ex. 1-E), (367a).

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* Sonderling had previously entered into a reorganization exchange agreement with Modern Television Services, Inc. by which 130,000 shares of its stock worth, at that time, more than 3-1/2 million dollars were to be exchanged for the assets of Modern Television Services, Inc. The latter company was an affiliate of Modern (Ex. JJ).

Sonderling's offer would have netted two and a half million dollars or more than $26.45 per share to Modern's shareholders since $300,000 would have been paid to Weil's company for its services in bringing the parties together out of which Pepper was to be paid $100,000 for all of his services rendered in the transaction (634a). The original Sonderling letter came to rest in Arlinghaus' hands because she produced it on her deposition (131a). She obviously received it from the management.

Pepper exhibited the copy of Sonderling's offer which he received to Arlinghaus and Eberle and they, as Modern stockholders, approved the terms of the offer (637a). Pepper advised Sonderling of such approval (637a).

At a meeting of Modern's Board held April 8, 1968, the sale of Modern's assets to Sonderling for $2,800,000 and the assumption of Modern's liabilities was approved by the Board by a divided vote. The holders of more than two-thirds of Modern's stock, Arlinghaus and Eberle as well as certain other stockholders, gave their written consent to the transaction and to the payments of Pepper's fee (646a, 640a-641a). The Board also approved the fee arrangements thus provided for.

The arrangement whereby Pepper's fee would be paid out of Weil's brokerage had emanated with Sonderling which contemplated pooling its and Modern's earnings, a course deemed advantageous by Sonderling (408a-410a).

In or about December, 1967, one, Sherman Unger (Unger) a Cincinnati attorney, had learned of Modern through Dan Kater, a Modern officer and a close friend of Unger, who suggested to Unger that if he could put together a group of investors to acquire Modern "it's something that the executives would appreciate" (329a-330a). At this point it should be remembered that the principal officers of Modern were not stockholders of the company, and their later actions demonstrated that they were largely motivated in favoring Unger over any other purchaser because he had promised them a 30% participation in Modern at the same price which he paid for its stock but with a period of years to pay for it (359a-363a, 334a). In fact, the designation of the executives who were to enjoy the benefit of Unger's promise was left to Mr. Lenz who designated himself, Messrs. Oard, Kater and four others, none of whom was a Modern stockholder (360a).

Additionally, it may be surmised, Lenz, Oard and the rest of the management group saw that with Unger (who intended to be a passive investor while continuing his law practice in Cincinnati (333a, 686a) in command, they would continue to be as indispensable to Modern's business as they were under Arlinghaus, while with Sonderling or Cahner (of whom more will be said, infra) they were confronted with successful business executives in related fields - men who, it might well be anticipated would not surrender the field to Lenz and the others.* Lenz' stock moti-

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* Sonderling gave Lenz and his minions the assurance of one year contracts only (294a).

vation was confirmed in his deposition testimony (253a).*

It is readily understandable that the attractiveness of Unger's proposal to Lenz and his associates made them very cooperative with Unger who came to New York where they gave him the financial and other information which he requested (331a-332a)(Ex. 1-E). Early in March, Lenz arranged a meeting between Unger and Pepper. They met on March 12, 1968 and Unger offered $20.00 a share for 100% of Modern's stock (338a).

Unger testified that at such meeting he indicated to Pepper that a price of $25.00 per share was within his range (339a), but he felt that the deal could be done between the $20.00 and $25.00 figures. Pepper immediately advised Arlinghaus of his meeting with Unger and he proposed that he, Arlinghaus, Eberle and McCallum meet with Unger, following Mrs. Arlinghaus' return from a cruise from which she was embarked (620a). Subsequent to the meeting with Pepper, Unger met with William McCallum (McCallum), executive vice president of Modern, and increased the ante to $21.00 per share which was agreeable to McCallum and his daughter (344a). McCallum recommended the acceptance of $21.00 per share from Unger but subsequently voted against the Sonderling $26.45 proposal, as did Lenz and Oard (641a). On March 23, 1968, Unger met with Arlinghaus and Pepper and renewed his $21.00 offer which he confirmed by letter to Arlinghaus on March 26, 1968.

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* Oard had the same incentive (257a, 292a-294a, 296a) Ex. 1-E.

(352a) Not until May 10, 1968 did Unger make an offer at a price greater than $21.00 per share. On that date he made his tender offer at $27.00 per share (655a) but this offer followed the granting of the temporary restraining order by the Delaware Court and was more than a month after the April 8 meeting at which the board had accepted the Sonderling offer.*

Appellee Hough was the owner of 500 of Modern's 94,500 shares. On May 9, 1968, through counsel recommended to him by Unger, (Transcript p. 501), he commenced an injunction proceeding to bar Modern's asset sale to Sonderling. The expenses of the litigation were borne by Modern although the corporation had not authorized the action (Transcript p. 501) and, in fact, could not have authorized the action in the face of the Board resolution approving the sale. On the morning of May 15, 1968, the Sonderling transaction was temporarily enjoined and since Sonderling's financing of the transaction expired that same afternoon, the effect of the injunction was to kill the Sonderling purchase.

On May 10, 1968, Oard, although he could not have seen Unger's offer, which, also dated May 10, 1968, was not

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* Unger's testimony of his willingness, allegedly expressed to Pepper, to go to $25.00 a share was given in aid of the injunction application. Is it credible that having already tipped his hand to Pepper in such fashion that he would have persisted throughout in offers of only $21.00?

received until May 13, 1968, wrote to Eberle to urge him to accept the offer. Notably, he pointed out that Lenz and the five additional beneficiaries of Unger's promised right to purchase 30% of Modern's stock, joined with him in the recommendation. Oard, in his letter, minimized the effect of Unger's reservation of the broad right "to verify the books, records and assets of Modern" as a condition of the duty to accept the shares that were tendered (658a). Out of harmony with that position, he testified that the escrow requirement of the Sonderling proposal that a portion of the price be escrowed to secure warranties with respect to Modern's assets and financial condition was a motivating factor of his vote in opposition to the Sonderling proposal (290a).*

In the interval between the April 8 meeting of Modern's Board and Unger's offer of May 10, 1968, Cahners Publishing Company of Boston, Massachusetts (Cahners) offered in writing to purchase Modern's stock for $3,000,000 in cash -- $450,000 better than Unger's offer (653a)(Ex. YY). Management took no steps to follow through on the offer (Transcript p. 447).

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* Sonderling testified (366a) that he had agreed that the escrow fund would come out of the Arlinghaus and Eberle share of the proceeds only, and that the minority stockholders would receive their full shares without deduction. Curiously, Oard's objection to an escrow requirement evaporated in his consideration of Unger's offer to purchase the assets. Unger's proposal incorporated a 40% escrow requirement (656a).

On May 24, 1968 a Modern Board Meeting was held at Arlinghaus' home in New Jersey. After rescinding the resolution approving the Sonderling sale, Oard first proposed a resolution that Lenz as Modern's President to be authorized to waive the corporation's rights under the "buy-back" agreement which obtained with respect to its stock in favor of any shares tendered to Unger in response to his May 10, 1968 offer. The motion was carried. Mr. Oard next moved the acceptance of the alternative asset purchase offer contained in Unger's letter so that the asset proposal could be accepted if 100% of Modern's shares were not tendered to Unger as required by his offer. It is noteworthy that Unger's asset purchase offer contained essentially the same escrow requirements as were contained in Sonderling's proposal. Over the strenuous objection of one of the Directors that the vote on the proposal should not be taken until the Board had heard from Mr. Cahners who was waiting in the next room, Lenz railroaded through the vote and the resolution was then carried (679a-694a).

After next resolving to terminate Pepper's services, Mr. Cahners was finally requested to enter the meeting. He confirmed his willingness to pay $3,000,000 for the stock or the assets and stated that his offer was firm subject to verification of Modern's financial statements and assets (just as Unger had specified in his proposal) and expressed his willingness and his desire to retain the management but his words fell on deaf ears (700a-718a). Cahners sensed the hostility of the Management

to him (716a-717a). For his efforts, Cahners received a polite dismissal (718a).*

Pepper was also discharged as Arlinghaus' attorney on May 21 or 22, 1968 (137a), who gave no reason for doing so except that she wanted to (Transcript p. 621). William E. Kelly (Kelly) of Casey Lane & Mittendorf, the appellees' present attorneys, who had been recommended by Unger (150a, Transcript p. 622) was retained.

After Pepper was discharged, Kelly and Arlinghaus demanded of Pepper that he deliver to them the records of Modern and Arlinghaus' stock certificates which Pepper had in his possession. Pepper declined to do so unless his outstanding fees and disbursements were paid and he asserted his attorney's retaining lien upon them and also upon stock certificates belonging to Eberle which he had in his possession. On June 3, 1968 a summary proceeding was commenced in the Supreme Court, New York County by Kelly's firm in the names of Modern, Arlinghaus and Eberle. The object of the proceeding was to compel Pepper to surrender the books and stock certificates upon which he had asserted his lien. No order issued on the application.

On June 7, 1968, Modern's officers and stockholders, except Eberle who was in Florida, met at Modern's office. Allegedly, Unger's tender offer was scheduled to expire that day. The lead roles were carried by Unger and Kelly. By this time, Weil was firmly in Unger's camp and seeking to obtain some commission from him

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* Much was made of Cahner's desire for an opportunity further to verify Modern's condition. Oard's May 10 1968 letter minimized Unger's like requirement (658a).

if one could be earned. (Unger had agreed to pay him something for his help (234a)). Through Weil's intermediation, Pepper was induced to accept $75,000 in settlement of his $116,000 claim. A settlement agreement was drafted by Pepper's then counsel (Ex. WWW), and extensively revised on Kelly's insistence (165a). With some further modifications, the agreement in final form (827a) was prepared which Kelly then brought to the appellees who were assembled in a separate room where, after the agreement was read to them by Kelly, it was signed by them (165a, 166a). After the appellees had signed, the agreement was brought out to Pepper for his signature which was obtained (165a), the books and stock certificates surrendered and the assignments called for by the agreement delivered (830a-837a).

The settlement agreement was a charade. We'l testified (226a):

> "They had everybody there at Modern Talking Picture, and Unger finally said okay, he says, 'Tell Pepper that we will pay him $75,000, providing that we do get his resignations.' He said, 'As a matter of fact, it wouldn't matter if we paid him one hundred; I've got to get his settlement and his release. We could even agree to settle for $100,000, because after I get all the papers, we have no intention of paying him anyway.'"

In the course of the meeting, Unger advised the assembly that, if they were to countermand their instructions to pay Pepper, he would abide by it and Kelly so admitted (157a). Unger's parting words when the meeting broke up were that he would not honor the assignment if he were instructed

not to do so (157a). Kelly was a party to the arrangement and explained the form which the scenario would take (821a).

ARGUMENT

As will be demonstrated in the course of the argument which follows, the findings of fact of the Court below are clearly erroneous. In important instances the findings are at odds with uncontradicted documentary proof, and where such is the case and particularly where the findings may be crucial to the decision, as is the case here, such findings are not binding on this Court and should be given slight weight upon appeal. See the opinion of Judge Frank writing for the majority of this Court in Orvis v. Higgins, 180 F.2d 537, 538 (C.A.2d, 1950). Additionally, errors of law were committed which would alone justify a reversal. We shall demonstrate that Pepper performed valuable legal services for the appellees for which he was entitled to be compensated and as a consequence had a valid retaining lien on the Modern records and Arlinghaus and Eberle stock certificates; and further, that in no event was duress exerted upon the appellees by Pepper so as to entitle them to prevail in this action.

I.

Pepper Performed Services for the Appellees for Which He Was Entitled to Be Compensated

Even Judge Frankel conceded that Pepper had rendered

services to Modern in screening prospective purchasers of the corporation's stock or assets. While he sought to deprecate the extent of these services in Note 1 to his opinion (which as we have demonstrated at Page 5 of this brief proceeded upon an erroneous assumption) and the quality of the services and the need therefore (although it appears that Modern and its stockholders were the judges of that need), he nonetheless found that services had been performed.

The evidence (Exs. V, 23 and 23A, 500a, 502a, 527a) establishes that the services which Pepper performed were performed for Modern at the request of its president, Lenz. Additionally, the contract for the sale of Modern's assets to Sonderling was prepared in implementation of the resolutions of Modern's board adopted on April 8, 1969 authorizing the transaction (553a-609a).

So far as services to Arlinghaus and Eberle are concerned, the services performed by Pepper with respect to offers to purchase the shares of Modern stock held by its stockholders were necessarily performed for them individually in their capacity as stockholders of Modern, and additionally, so far as Eberle is concerned, the undisputed evidence was that Pepper had prepared a trust agreement, a designation of additional trustees thereunder, and a fiduciary income tax return (467a - 488a, 493a - 497a, 490a).

Having acknowledged that Pepper had performed services for Modern, the Court below was constrained to find that

Pepper was owed nothing for them. This the Court sought to do by holding that the services represented nothing beyond what Modern was entitled to receive for the monthly $1,000 retainer paid to Pepper under a retainer agreement, and that, in any event, Pepper had not obtained Lenz's "prior approval" as required for added charges beyond the scope of the retainer. So far as material to this issue, the retainer agreement contained the following provision:

> "The retainer includes all legal services for the corporation of the character and amount heretofore performed which can be performed in the City of New York during customary business hours, but not litigation and special services such as trademark services. No charge shall be made by us for any legal services not covered by the retainer except with your prior approval."

It is to be noted that the services which are covered by the retainer are clearly specified to be services "of the character . . heretofore performed . . . but not litigation and special services . . . ." It is not to be supposed that transactions involving the sale of all of the corporation's assets were services of the character theretofore performed by Pepper, for, obviously, if Modern had sold all of its assets prior to the events in issue it would probably have ceased to exist and in any event would not have been contemplating the sale transactions then under consideration. Obviously, a transaction such as was contemplated, having the effect of putting Modern out of the business in which it was then engaged,

could not be comprehended within the scope of a retainer agreement by which Pepper had undertaken to perform services related to Modern's then on-going business.

The construction of the retainer on which the Court below based its opinion is clearly erroneous, for under such construction, Pepper would have been obligated, if the Sonderling transaction proceeded to a conclusion, to handle a $2,800,000 sale of assets transaction with all of the difficulties and complications attendant thereon, and undoubtedly the liquidation and dissolution proceedings which would necessarily follow if a double tax (one at the corporate level and another at the stockholder level) were to be avoided under § 337 of the Internal Revenue Code, all for the sum of $1,000 a month for the number of months involved in the undertaking. Is it credible that the parties could have intended that the retainer agreement would cover the extraordinary services which counsel for Modern would necessarily be called upon to perform in connection with the sale of its assets and its subsequent liquidation? We venture the opinion that there is not an attorney in practice in the whole area between the Courthouse of this honorable Court and the Battery who would undertake the work and responsibility of a multi-million dollar transaction for a fee of one, two or possibly three thousand dollars.

So far as concerns Judge Frankel's finding, "that Pepper never had Lenz' prior approval," the finding is clearly

erroneous in the face of the Bell & Howell Company letter (501a) which corroborates Pepper's contemporaneous memorandum of September 27, 1967 contained in Ex. 23 (507a), but even if this were not so, the resolution of Modern's Board authorizing the transaction was a sufficient mandate to Pepper to justify his efforts in the direction of bringing the Sonderling transaction to a conclusion and to entitle him to receive payment for those services outside of the scope of the retainer agreement.

We submit, also, that a construction of the retainer agreement which would make Pepper's right to additional compensation depend upon a magic "Open, O Sesame" uttered by Lenz is erroneous as a matter of law. In Roberts v. Veterans Co-Op. Housing Asso., 88 A.2d, 324 (Mun. Ct. of App.), D.C., (1952), the plaintiff representing the co-operative had agreed to a monthly retainer to cover legal work done for the defendant except in exceptional cases. In accepting the retainer, the plaintiff attorney wrote that it should be understood that "in the event of any major project we will previously agree with the president and the board as to any additional payment". Shortly thereafter, the plaintiff was authorized to petition the Rent Control Administrator for an increase in the rent ceilings applicable to the premises leased by the defendant to its tenants. The plaintiff took the necessary proceedings, as a consequence of which an increase of rent was obtained,

whereupon the plaintiff rendered his bill for his services on the theory that it was an "exceptional case" and therefore outside of the scope of his retainer.

While the Court ultimately held that the particular services were not exceptional, the Court, nonetheless, ruled that if the case were in fact exceptional, the absence of a prior agreement as to the plaintiff's fee would not preclude a recovery for his services, saying:

> ". . . However, we do not think that the absence of an agreement as to the nature and compensability of the services in the rent case precluded a recovery for those services if the rent case was in fact exceptional. The agreement clearly called for additional compensation in exceptional cases."

So far as concerns Pepper's entitlement to compensation for services in connection with the sale of Arlinghaus' and Eberle's Modern shares, Judge Frankel found that neither of them had authorized Pepper to perform compensable services in that connection. (Did they authorize him to perform only non-compensable services?) Arlinghaus admitted that she directed Pepper to pursue the Sonderling offer which was for stock as well as assets (243a). Pepper also participated with her in the meeting with Unger and Pepper testified that she had requested him at the meeting at Baltusrol in December, 1967, if not earlier, to screen prospective purchases of Modern's stock.* Was it necessary for Arlinghaus to say to Pepper that

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* In fact, Judge Frankel must have accepted this testimony, for he based his Footnote 1 calculations thereon.

she would pay him for the work which she was asking him to do in order for him to be entitled to compensation for doing it? If she asked a housepainter to paint her house in Rumson, New Jersey would the painter's right to compensation depend upon whether Arlinghaus stated that she would pay him? The law is clear that the rendition of services by a lawyer creates an obligation to pay him on the part of the one who represents them. As the Appellate Division stated, per Breitel, J. (now Chief Judge of the New York Court of Appeals) in Rudnick v. Tuckman, 1 A.D.2d 269, 149 N.Y.S.2d 809 (1956)).

> ". . . The fact that plaintiff is a lawyer should not put him in a less advantageous position than a grocer, a dressmaker or a landlord. Indeed, the services rendered by the lawyer may, in appropriate circumstances, be more vital to the client".

So far as services to Eberle are concerned, he knew of Pepper's efforts with respect to many of Modern's suitors who sought the stock of the company (211a-213a) and he, as Arlinghaus, could not have the benefit of Pepper's services without a correlative duty to pay for them.

The facts were that Pepper in dealing with would-be purchasers at the request of the corporation and at the request and knowledge of the shareholders may have been performing services for one, the other, or both at the same time. This flows from the fact that in a case in which his services were in connection with a sale of assets, the obligation to pay him rested with the corporation, whereas in the case of a prospective

sale of stock, the obligation fell upon the stockholders. Thus, Pepper's statement that his claim for fees was against either the corporation or the shareholders or both, did not justify the characterization which the Judge below placed upon it, for contrary to Judge Frankel, Pepper's services were performed for Modern, for Arlinghaus, for Eberle and in fact for all of the other appellees as well. As justification for the position which he took, Judge Frankel made the curious statement that while potential sales of Arlinghaus' and Eberle'e stock might benefit them "his (i.e. Pepper's) work as paid retained counsel for the close corporation embraced that without further obligations from them to him". Quite apart from the fact that the retainer agreement contains no such express or implied provision, the proposition is clearly unsound and, certainly, the Commissioner of Internal Revenue would confidently so contend. If the stock of a close corporation is sold, is the fee to which the lawyer is entitled for his services in connection with the sale to be paid by the corporation or by the stockholders? If paid by the corporation, it is clearly not entitled to a deduction for the payment as an ordinary and necessary business expense since, in fact, such payment represents a dividend to the shareholders who are responsible for the payment of their own fees. And if stockholders are entitled to enjoy the benefit of the fees which are paid to their attorneys by the corporation of which they are stockholders where shares

of their stock are concerned, are they also entitled to have the benefit of the corporation's payment in the case of services of a different character which are performed for them by the same individual who is the corporation's attorney? By an extension of Judge Frankel's reasoning, Eberle was under no duty to pay Pepper for the latter's services respecting Eberle's trust agreement and fiduciary income tax return. Since such a proposition may not be asserted (what of the rights of small shareholders to enjoy comparable fringe benefits?), Judge Frankel was forced to state that there was no understanding that Eberle owed Pepper anything which is quite different from what would have been a meaningful statement that there was an understanding that Eberle owed him nothing.

It is, we believe, established by what we have said that Pepper had performed valuable services for Modern and the appellees which justified the retaining lien which he asserted.

Bogaards, one of the appellees and a vice-president of Modern, recognized the justice of Pepper's claim (187a - 188a):

> "Q You knew Mr. Pepper had screened and worked on a number of proposals to take over the company, did you not?
>
> A Over the year, yes. He had worked on various proposals, I am sure, which he discussed with me on the telephone at various times.

I knew that he had done a lot of legwork, you know, on proposals like that, and I felt that he was doing it for the company. Let's face it, he wasn't doing it for me in particular. He was doing it for the corporation.

Q And for --

A And for that --

Q And for the stockholders?

A I know -- I don't think it was for the stockholders. I think he did it for the company. I mean, as far as I was concerned, that anything he did for the company was good for the company, so that's the reason I mentioned a specific amount of $25,000 for the services that he had gone into and for the legwork and doing work he had done to prepare these various things.

Page 38, line 18:

Q Didn't you agree that Mr. Pepper's services in connection with these various offers and negotiations for the sale of the company or its assets should be compensated?

A I agree.

Q In other words, your feeling about it is that the amount he claimed was too much?

A Much too much.

Q And that $25,000 that you say you offered him was appropriate and that he should be paid?

A I think that $25,000 was a reasonable amount, yes, I do."

II.

The Sonderling Transaction

Throughout the findings of the Court below relative to the Sonderling transaction there runs an undercurrent of suspicion of Pepper's motives and a questioning of the propriety of his actions. Perhaps the fact that the Court below overlooked vital portions of the record accounts for this. In the Court's seventh finding of fact, it is stated that Modern's Board never knew of the terms of the offer until the April 8 Board meeting at which it was approved, and in the context of the finding the suggestion is implicit that Pepper withheld the information from the Board for some nefarious purpose of his. But, as we have shown, supra, p. 9 , Weil, who was in Unger's camp at the time that his deposition was taken, testified that Sonderling's March 20 offer had been hand delivered by him to Oard or Lenz and that only a copy had been given to Pepper. Weil's testimony is, as we have pointed out, consistent with Sonderling's testimony. Judge Frankel's finding ignores this testimony and

also ignores the fact that the original Sonderling offer letter was produced by Arlinghaus who could only have gotten it from Oard or Lenz (131a). The Court's finding on this point also ignores Pepper's testimony (133a) that he showed a copy of the letter to the Directors and his further testimony that Mr. Lenz, Mr. Oard and other officers of Modern had met with Sonderling and responded to his detailed inquiries about the business, and Pepper's testimony on this score is corroborated by appellee Del Coro's testimony (199a) as follows:

"Q You knew about the Sonderling offer, did you not?

A Most assuredly, yes.

Q When did you first hear about that?

A The first time I heard about the Sonderling offer was in a meeting. The word 'heard' bothers me. The first time I learned the details of the Sonderling offer was in a joint meeting in the conference room of Modern Talking at which Mr. Sonderling and his associate were present and at that point in time he went on to explain substantially that his views were toward purchasing the company.

Q Who was present?

A All of the officers, I believe some of the department heads, the employee stockholders, Mr. Sonderling and one of his associates.

Q And the directors?

A The non-employee directors, rather, the employee directors of the company, not the nonemployee directors."

Finding number ten is also clearly erroneous. Pepper never characterized the $100,000 fee as anything other than the fee which he considered fair for the legal services he was rendering and would be rendering in connection with the Sonderling transaction. The finding also ignores the explanation tendered by Pepper that the arrangement for the payment of his fee out of the Weil commission emanated from Sonderling's accountants (409a-410a) and had to do with the pooling of Modern's earnings with Sonderling. It also ignores Pepper's testimony that in his conversation with Ritenour who was the president of Modern Teleservice, Inc., Modern's sister corporation, the latter had advised Pepper that he, Ritenour, had consulted with his own attorney for the purpose of determining an appropriate reserve for legal services in connection with the Modern Teleservice, Inc. transaction then pending, and that Ritenour's personal attorney had stated that a fee of $100,000 would be an appropriate amount for the legal services to be rendered (52a).*

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* The only basis to be found for Judge Frankel's view was that Pepper, before signing his deposition, had changed some of his answers to ambiguous questions to avoid the possibility that the answers would be construed as an admission that his arrangement with Weil was for a finder's fee and not a legal fee.

The Court below, in the same finding, stated that Pepper had rendered no legal services to anyone which would justify a legal fee of $100,000 and he, therefore, characterized Pepper's claim to such sum as the share of a finders fee. The finding ignores the fact that the fee was fixed before the work on the project was to be undertaken in anticipation of the very substantial work and responsibility which Pepper would be required to undertake in connection with the multimillion dollar sale of assets transaction. So viewed, the fee was reasonably estimated at the time it was fixed. There is no warrant for the finding that the money represented a finders fee simply because the full services contemplated had not been rendered by the time the transaction aborted.

Since the Sonderling transaction does not have any significance on the outcome of this case (except in the respect that Pepper's services in connection with the transaction support his claim for compensation from Modern), the findings dealing with this matter appear to be irrelevant.

As we have noted under Point I of the Argument, Pepper performed legal services for Modern, (and for Arlinghaus and for Eberle) for which he was entitled to be compensated outside of the retainer agreement. As we pointed out in our concluding paragraph of Point I, Mr. Bogaards, one of the appellees and a vice president of Modern, testified of his knowledge of the work done by Pepper with respect to the proposals

that had come to Modern which justified in his view the payment of $25,000 to Pepper.

III. The Court Below Erred in Holding that the Settlement Agreement was the Product of Duress

If, as we have said, Pepper had a valid claim for compensation against Modern, Arlinghaus or Eberle, his lien was valid and his insistence upon it could not have subjected the appellees to duress. First National Bank of Cincinnati v. Pepper, 454 F. 2d 626, 633 (C.A. 2, 1972) and cases cited therein. The same proposition is true if the lien was valid only as to Eberle's shares since, it was, according to appellees, indispensable to them that they obtain from Pepper all of the property which he was holding. The retrieval of some of the property would not, according to them, have satisfied Unger's requirements. Thus, the decision should be reversed if this court finds that Pepper had a valid lien on Modern's records, on Arlinghaus' stock or on Eberle's stock.

In order to sustain their claim that Pepper was guilty of duress it was encumbent upon the appellees to establish that Pepper's assertion of the lien compelled them to yield to his wrongful demands because their urgent need for the property which he held precluded the exercise of their free will in concluding the settlement agreement. Austin Instruments, Inc. v. Loral Corp., 29 N.Y.2d 124, 130, 324 N.Y.S. 2d 22, 25 (1971). Subsidiary to the foregoing

rule, it was incumbent upon the appellees to establish that they had no lawful means of recovering the property which they needed other than by yielding to Pepper's demands. First National Bank of Cincinnati v. Pepper, supra, p. 634; Peyser v. Mayor, 70 N.Y. 497, 501 (1877).

Indispensable to the appellees' proof in the Court below, and completely absent from the record, was any showing that Pepper did not consider the fees he demanded to be reasonable. Such a showing was required because the law of the State of New York requires that the bad faith of the party asserting a claim must be shown. Thus, in Austin Instruments, Inc. v. Loral Corp., supra, the Court below (reversed an appeal) in denying Loral's claim, had taken pains to point out (35 A.D. 2nd at p. 391) that Loral had failed to establish that Austin's claims for retroactive price increases above those specified in its contract with Loral were made in bad faith. Oleet v. Penn. Exchange Bank, 285 App. Div. 411, 415, 137 N.Y.S.2d 779, 783, states this requirement explicitly. See also Jack Winter, Inc. v. Koratron Company, 329 F. Supp. 211 (N.D. Cal., 1971), wherein the Court held that threats to take legal action constitute duress only where the person asserting the claim knew at the time he asserted it that it was false. Williston on Contracts (3d Ed.), Vol. 13, pp. 672, 673 is to the same effect, the author there noting that a resort to remedies available under a contract is not such duress as will justify rescission of a transaction induced thereby; and that

the rule holds even though it be subsequently determined that there was no right to enforce the claim "provided the claim is made in good faith, i.e., in the reasonable belief that a possible cause of action exists".

Even if it were to be assumed that Pepper had no lien on Modern's or Arlinghaus' property, the decision below would have to be reversed if, in fact, Pepper had a lien on Eberle's property for it was a condition of Unger's offer that 100% of Modern's outstanding shares be tendered. As a starting point, it is clear that Pepper had a lien on Eberle's stock for the fees owed to Pepper for the work done for Eberle with respect to the trust which Eberle had created. Recognizing this fact, the Court below stated that "there was no understanding that Eberle owed him anything". Like the Court's statement in the context of the work done for Arlinghaus and Eberle as stockholders (that neither had authorized Pepper to perform compensable services), the statement is a curious one for when a lawyer performs services at the instance of his client the understanding that the client will pay for such services is implied in law, Rudnick v. Tuckman, supra. And as Judge Breitel observed in the cited case, the client is obligated to pay unless the lawyer "agrees not to be compensated". If a lawyer were entitled to fees from his client only when there was an understanding that such fees were owed, there could never be a case of a lawyer prevailing in an action for his fee. Certainly, the record is devoid of any evidence that

Pepper had agreed with Eberle that no charge for Pepper's services would be made; and it is of no consequence that bills for other services rendered by Pepper to Eberle may not have been sent for the failure to send a bill may have been attributable to Pepper's neglect or oversight, to a determination by Pepper that the time was not propitious for him to send a bill and that he would wait until Eberle "came into money" before doing so, or any other number of possible explanations. Even if Pepper, before the preparation of the trust agreement and performance of the related services for Eberle had expressly made a gift of prior services to him, Eberle would have had no enforceable right to contend that any subsequent services which Pepper might render for him should also be rendered without charge. Thus the finding that Eberle was under no obligation to Pepper at the time that the latter asserted his lien is wrong as a matter of law.

The validity of Pepper's claim to a lien is intimately related to the proceeding instituted by Kelly's firm on behalf of Modern, and Arlinghaus - and allegedly Eberle - to obtain possession of the property which Pepper was holding, for regardless of the correctness of Judge Frankel's findings with respect to the events which transpired in the courtroom, the fact was that Eberle had not authorized the action nor retained Kelly to represent him. Judge Frankel found that Eberle had

authorized the action on his behalf, "his later denials of this reflecting crass* motives". On this issue, this Court is in as good a position as the trial judge was to determine the truth of Eberle's assertions that Kelly did not represent him and was not authorized to take action in his behalf, for Eberle did not appear as a witness on the trial and the Court below had only his deposition to read. On deposition, Eberle testified extensively on the subject. On his examination he was asked and gave the following answers (208a-210a):

"A It was -- I had not employed -- I don't know what term you use -- Mr. Kelly or his firm.

Q That's correct. Now, where -- well, is it still correct that you had not employed --

A Still correct.

Q Still correct?

A Yes, sir.

Page 41, Line 8:

Q Did **you** know before receiving this affidavit,** this copy of the affidavit, that you had been included as a party plaintiff?

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* Webster's Third New International Dictionary defines "crass" as lacking in delicacy, devoid of refined sensibility, gross, unfeeling or stupid.

** The affidavit of William E. Kelly sworn to June 3, 1968 in support of the petition to the Supreme Court, contained in Ex. 6 (728a,730a).

A No.

Q Did you receive any bill from Mr. Kelly or his firm for services or disbursements?

A No, no.

May I make a statement on that?

Q Yes, sir.

A May I look at it again?

Q All right.

A This is the first time I have seen Mr. Kelly's -- or yesterday is the first time I had seen Mr. Kelly's affidavit and I was more than shocked, I was very angry on the day that this telephone call was made, which is referenced by a copy of a bill I presume from the Casey, Mittendorf firm.

On top of the list there, May the 29th, which says on which date the deponent was retained by Howard H. Eberle.

I received a telephone call that day from Rosalie Arlinghaus, who turned the phone over, subsequent to her remarks which to my knowledge was probably with respect to selling the stock to Unger.

The phone was turned over to Carl Lenz. I particularly remember that because Mrs. Arlinghaus had some very peculiar habits, one of which -- which

Mr. Lenz can acknowledge -- was I heard her as she was turning it over say, 'Now, Carl, don't louse it up.'

So when Carl Lenz -- not Carl Lenz -- George Vickers -- 'George, don't louse it up', and when George got on the phone to talk with me that was the first thing I said to George, 'Make sure you do what the lady says, don't louse it up', and he laughed.

This is what makes me remember that she initiated the phone call.

The next party who got on was Mr. Kelly and he said, 'I will represent you,' and I said in no uncertain terms, 'You have not ever represented me nor will you represent me,' or words to that effect."

(215a-217a)

"A Nowhere in the files of Casey, Mittendorf or in Mr. Kelly's do you have anything on record which shows that I have signed any document appointing him attorney for me nor did I ever, as I testified, receive a bill and I don't intend to honor it if I do receive it.

I am telling the truth and I will continue to tell the truth.

Page 73, Line 24:

Q My first question to you is this, Mr. Eberle, do you recall that during that telephone conversation, that is to say the one you had first with Mrs. Arlinghaus and then you saw Mr. Vickers --

A It's the same conversation.

Q And thereafter --

A The same telephone call, I mean.

Q Yes, about which you have previously testified.

A Yes.

Q Do you recall that the question of the fees to be paid for the proceeding which was contemplated came up?

A Never.

Q Do you recall that you made the point to Mrs. Arlinghaus or Mr. Kelly or maybe I should say to Mrs. Vickers that you were concerned that this proceeding might cost you something?

A No, sir.

Q And do you recall that you received assurance that it would not and that thereafter you agreed to go along?

A No, sir, that was never in any way mentioned.

Q It is your testimony now that neither in your conversation with Mr. Vicerks or Mrs. Arlinghaus or Mr. Kelly was the question of a fee or the payment of costs of litigation raised?

A That's right. There never was a question of fees or costs of litigation raised."

In response to questions by Mr. Jensen, an associate of Mr. Kelly's, Eberle testified further: (218a-220a)

"Q And give your full attention to what I am going to ask because, as you probably realize, there is now a clash between what Mr. Kelly said in his affidavit and what your testimony has been.

A That's right, that's right.

Q About the telephone conversation, and it is very important for both of you, I think, to try to refresh your recollection to the fullest and that's my purpose for the next question that I am going to ask you.

The first question is this.

A Now, before I answer any of these questions --

Q Yes?

A Since you have made a statement, I want to make a statement that I have no --

Q Off the record you may do so.

A Well, you made it on the record.

Q Yes.

A But why can't I make it on the record?

Q Well, make it brief, please, and I will let you make it on the record.

A Well, if you don't, I will ask Mr. Matthews to ask me the same question.

Q We will listen.

A I want to tell you that I have no axe to grind with Mr. Pepper or Mrs. Arlinghaus. I was never a party to this litigation and I don't know why I should be brought in now.

What I have told you is the truth and I don't care whether it hurts Mr. Pepper or whether it hurts Mrs. Arlinghaus, but I don't like people testifying falsely about an arrangement. (Emphasis added)

Nowhere in the files of Casey, Mittendorf or in Mr. Kelly's personal files do you have anything on record which shows that I have signed any document appointing him attorney for me nor did I ever, as I testified, receive a bill and I don't intend to honor it if I do receive it.

I am telling the truth and I will continue to tell the truth."

When Mr. Kelly's deposition was taken he was asked whether he or his firm had ever represented Eberle prior to June 8, 1968. The answer (152a) was as follows:

> "A No. I don't really believe we ever represented Mr. Eberle, although Mr. Eberle, it seems to me, was in communication with Mrs. Arlinghaus, but I don't believe we represented Mr. Eberle.
>
> I might also add, I believe Mr. Eberle was in favor of some of the things that Mrs. Arlinghaus was doing, but, again, I don't believe my representation was of Mr. Eberle."

Is it nor more than passing strange that Eberle was requested to send and did send to Arlinghaus an authorization to pick up his stock (767a) but that no telegram was ever requested or sent to Kelly to authorize him to act on Eberle's behalf. The Court ignored all of this evidence and accepted Kelly's self-serving declaration - contradicted by his own deposition testimony - that he had been authorized to act for Eberle. Judge Frankel's finding on this score was therefore clearly erroneous.

Lastly, we submit that appellees fail to demonstrate an urgent necessity for the property which Pepper was holding. There are a number of reasons why this is so:

a. The finding that June 7, 1968 was a crisis date runs counter to every reasonable inference which may be drawn from the record.

1. Lenz in his affidavit dated May 31, 1968 in support of the application in the Supreme Court proceeding stated that the Unger offer had been extended "for a limited, indefinite time" by Unger. No mention of a June 7 deadline appears in his affidavit (737a).

2. Arlinghaus in her affidavit in support of the application said nothing with regard to any urgency, and Vickers, Modern's Secretary and Treasurer, did likewise (739a-745a).

3. In the letter addressed by appellee's counsel to Justice Riccobono of the Supreme Court, on June 5, 1968, only two days before the "deadline", no mention of the "deadline" was made and the only explanation offered to the Court was as follows:

> "The reason for the urgency is that there is outstanding a tender offer for the stock of the corporate petitioner, and the offer cannot be met until respondents return to the individual petitioners the Modern stock certificates owned by them and by the estate and trust which they represent." (759a)

4. On the following day, June 6, 1968, but one day before the "deadline", appellee's counsel again wrote to Justice Riccobono but made no mention of any June 7 deadline (769a).

5. From Ex. VVV (800a-823a) it is clear that Unger who was in attendance at the June 7 meeting of the appellees, of which Ex. VVV is a transcript, was perfectly willing to do an asset deal if a compromise with Pepper could not be accomplished that day (819a-820a). It defies the imagination that an asset acquisition agreement covering the company qualified to do business in 25 states with 33 film libraries (358a), numerous office leases with attendant landlord assignment problems, contracts, some of which were not assignable (Finding 17, 450a), and the preparation of the multitude of papers to close the transaction could have been accomplished on that day. Judge Frankel so found. Since Unger was willing to go the asset route if that were to become necessary, such willingness on his part manifests a like willingness to have extended the closing date for the further brief period which would have been required to obtain a decision from Justice Riccobono.

In view of the foregoing facts, Judge Frankel's finding that the appellees had no other feasible remedy than to conclude the agreement with Pepper on that day was clearly erroneous.

We cannot permit to go unchallenged the District Court's finding that Pepper had said that he was going to leave on a safari. Reluctantly, we must observe that Judge Frankel drew every invidious inference against Pepper that could be drawn on the flimsiest evidence. The matter of

the safari illustrates the point. All of the appellees knew that Pepper had suffered several coronaries (817a), for Lenz told them so at the June 7 meeting if they did not know it before. It is incredible that a man in his physical condition would contemplate a safari. As the transcript of the meeting makes clear, Lenz was concerned that Pepper might die and that the appellees would have to litigate with his estate (817a).

The genesis of the safari story is well documented. The story had its origin on June 7 when Weil, in a telephone conversation with Unger [recorded unbeknownst to Weil (235a)], in urging Unger to conclude the matter with Pepper, said the following:

> "You know, Sidney takes a month or two months off and he goes on these safaris to New Guinea, Africa, way-out places; go and try and reach him there." (784a)

In some unexplained fashion the statement of Pepper's habits became a statement of his intention in Weil's later deposition testimony.*

b. In truth and in fact, Modern, Arlinghaus and Eberle

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* If Pepper had, in fact, threatened to go on a safari, would not Weil who had just been speaking to Pepper say to Unger: "Sidney has threatened to go on a safari if you don't settle with him today"?

(if in fact Kelly represented him) had an available remedy under the New York Statutes. The fact that they misconceived their remedy and adopted a course ill designed to achieve their objective did not relieve them of the necessity of establishing that they had no available legal remedy.

Under Article 71 of the New York Civil Practice Law and Rules as it then stood, they could have brought an action to recover the property which Pepper held. Under the procedure authorized by the statute, even before the service of papers upon Pepper, the Sheriff upon being furnished with a summons and complaint, their affidavit identifying the chattel, asserting their right to possession thereto as against Pepper, a requisition and an appropriate undertaking would have seized the property without delay and delivered it to them on the expiration of three days unless, in the intervening period, Pepper had taken exception to the surety, moved for an impounding or filed the necessary papers to reclaim the property. Article 71 of the CPLR is available to the client of an attorney who seeks to recover corporate records which the attorney holds under his retaining lien. Hicksville Hall Corp. v. Haber, 43 Misc. 2d 512, 251 N.Y.S.2d 632 (1964). The failure so to proceed is particularly noteworthy in light of the fact that when, proceeding as they did, they failed to apprise the Judge of the "deadline" which confronted them.

c. The appellees could simply have given Unger their

bond or permitted Unger to withhold $116,000.00 of the sales proceeds until the validity of Pepper's lien was determined. Pepper never asserted title to the property he held but only a lien thereon, so that none of the parties would have been subjected to any risk if a bond for $116,000.00 and interest for a reasonable future period were given to Unger or if he were permitted to retain an equivalent amount out of the proceeds of sale. It is an everyday occurrence that stock certificates are lost or otherwise unavailable when needed in transactions of this character, and it is common knowledge among practicing attorneys that a bond or other arrangements may be concluded to remedy the deficiency. These practices are followed even in cases in which the absence of the certificate may give rise to a claim of title in a third party. How simple this procedure would have been where Pepper's claim was only for a liquidated amount and not one of title.

In light of the points which we have made, the finding of the Court below that June 7, 1968 was crucial to the appellees and that they had no alternative but to yield to Pepper was clearly erroneous.

CONCLUSION

The findings of fact made by the Court below were clearly erroneous and insufficient to sustain that Court's

decision. Additionally, the decision is infected with errors of law which reach to its fundaments. The decision, being clearly erroneous as to the findings of fact and in error as to the law, cannot be sustained and should be reversed.

Respectrully submitted,

BRAUNER BARON ROSENZWEIG & KLIGLER
Counsel for Sidney Pepper

Elias Rosenzweig
Harvey J. Ishofsky
Attorneys

§ 7101. When action may be brought

An action under this article may be brought to try the right to possession of a chattel.

§ 7102. Seizure of chattel on behalf of plaintiff

(a) **Seizure of chattel.** The sheriff shall seize a chattel without delay when the plaintiff delivers to him an affidavit, requisition and undertaking and, if an action to recover the chattel has not been commenced, a summons and complaint.

(b) **Service.** The sheriff shall serve upon the person from whose possession the chattel is seized a copy of the affidavit, requisition and undertaking delivered to him by the plaintiff. Unless the court orders otherwise, the papers delivered to him by the plaintiff, shall be personally served by the sheriff on each defendant not in default in the same manner as a summons or as provided in section 314; if a defendant has appeared he shall be served in the manner provided for service of papers generally.

(c) **Affidavit.** The affidavit shall clearly identify the chattel to be seized and shall state:

1. that the plaintiff is entitled to possession by virtue of facts set forth;

2. that the chattel is wrongfully held by the defendant named;

3. whether an action to recover the chattel has been commenced, the defendants served, whether they are in default, and, if they have appeared, where papers may be served upon them; and

4. the value of each chattel or class of chattels claimed, or the aggregate value of all chattels claimed.

(d) **Requisition.** The requisition shall be deemed the mandate of the court and shall direct the sheriff of any county where the chattel is found to seize the chattel described in the affidavit.

(e) **Undertaking.** The undertaking shall be executed by sufficient surety, acceptable to the sheriff. The condition of the undertaking shall be that the surety is bound in a specified amount, not less than twice the value of the chattel stated in the plaintiff's affidavit, for the return of the chattel to any person to whom possession is awarded by the judgment, and for payment of any sum awarded by the judgment against the person giving the undertaking. A person claiming only a lien on the chattel may except to the plaintiff's surety.

(f) **Disposition of chattel by sheriff.** Unless the court orders otherwise, the sheriff shall retain custody of a chattel for a period of three days after seizure. At the expiration of such period, the sheriff shall deliver the chattel to the plaintiff if there has not been served upon him either a notice of exception to plaintiff's surety, a notice of motion for an impounding order, or the necessary papers to reclaim the chattel. Upon failure of the surety on plaintiff's undertaking to justify, the sheriff shall deliver possession of the chattel to the person from whom it was seized.

Service of three ~~(3)~~ (2) copies of the within
is admitted this 10th day of Feb. 19 76

O'Melveny